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No. 311

Office - Supreme Court, U. S.
FILED
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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

THE UNITED STATES OF AMERICA, *Appellant*

v.

COLGATE-PALMOLIVE-PEET COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

BRIEF FOR COLGATE-PALMOLIVE-PEET COMPANY.

ALBERT C. WALL,
THOMAS G. HAIGHT,
JOHN A. HARTPENCE,
MASON TROWBRIDGE,
Counsel for Appellee,
COLGATE-PALMOLIVE-PEET COMPANY.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1938

No. 311

THE UNITED STATES OF AMERICA, *Appellant*

v.

COLGATE-PALMOLIVE-PEET COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

BRIEF FOR COLGATE-PALMOLIVE-PEET COMPANY.

Statement.

As this case presents the identical questions which are involved in the case of *United States of America, Appellant v. Durkee Famous Foods*, No. 309, October Term, 1938, the Court is respectfully referred to the appellee's brief in the *Durkee* case, in which this appellee joins, for a discussion of this appellee's contentions.

Conclusion.

For the reasons stated in the appellee's brief in the *Durkee* case, it is respectfully submitted that the judgment

of the court below sustaining the plea in bar to the indictment in this case should be affirmed.

ALBERT C. WALL,
THOMAS G. HAIGHT,
JOHN A. HARTPENCE,
MASON TROWBRIDGE

Counsel for Appellee, COLGATE-PALMOLIVE-PEET COMPANY.

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Supreme Court of the United States

OCTOBER TERM—1938

No. 311

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

COLGATE-PALMOLIVE-PEET COMPANY,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

MOTION TO ENLARGE RECORD.

ALBERT C. WALL,
THOMAS G. HAIGHT, and
JOHN A. HARTPENCE,
Counsel for Appellee.

Supreme Court of the United States,

OCTOBER TERM—1938.

No. 311.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

OLGATE-PALMOLIVE-PEET COMPANY,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

MOTION TO ENLARGE RECORD.

Now comes Colgate-Palmolive-Peet Company, defendant this cause in the United States District Court for the strict of New Jersey, which is now pending in this Court appeal by the above-named Appellant, and respectfully ves that this Honorable Court make its order to enlarge e record herein in the respects hereinbelow specified, and necessary to that end to issue its writ of certiorari com-nding the said District Court to certify and send to this urt a proper and complete transcript of the records so reinbelow specified.

The aforesaid additional records are as follows:

1. Memorandum opinion of the United States District Court filed January 14, 1937, in *United States* vs. *Durkee Famous Foods, Inc.* (No. 6821-b), supporting the order referred to in the plea in bar and answer herein quashing the previous indictment herein (Criminal No. 6817-b).

2. Correcting memorandum opinion of said United States District Court filed January 25, 1937, correcting the above mentioned opinion (Criminal No. 6821-b).

3. Motion to quash said previous indictment, filed on or about July 19, 1934 (Criminal No. 6817-b), referred to in the plea in bar and answer herein.

4. Prior indictment herein in said United States District Court returned and filed at the April 1934 term of said District Court (Criminal No. 6817-b), though Appellee is ready to stipulate that only paragraph 4 of Counts 1, 2, 8, 9, and 10, paragraph 1 of Counts 3, 4, 5, and 6, and paragraph 3 of Count 7, of said prior indictment, be included in the printed record in this Court.

The following are the reasons and grounds upon which Appellee bases this motion:

1. Without the aforesaid records this Court cannot fully consider and determine one of the principal contentions relied upon by appellee upon its plea in bar in the District Court, i. e. whether the prior indictment was quashed because it was "found defective or insufficient" and, therefore, whether the indictment herein is saved from the bar of the three-year statute of limitations (18 U. S. Code Sec. 582) by the saving statute, Title 18 U. S. Code Sec. 587 (May 10, 1934 c. 278, Sec. 1, 48 Stat. 772) providing as follows:

> "Whenever an indictment (prior indictment) is found *defective* or *insufficient* for any cause, after the period prescribed by the applicable statute of limitations has expired, a *new* indictment may be returned at any time during the next succeeding term of court following such finding, during which a grand jury thereof shall be in session" (The words in parenthesis and italics ours).

n order to determine whether or not the prior indict nent as "found defective or insufficient" (within the meaning f said saving statute) and hence whether said saving tatut applies, it is necessary to examine and consider he above mentioned records, i. e. the said opinion support- ng the order quashing said prior indictment, the motion nd factual elements on which said order was based, and o much of said prior indictment as is material to said nquiry.

Defendant-Appellee urged in said District Court herein pon said plea in bar, and will urge in this Court, that aid prior indictment was quashed because it appeared by he motion to quash that the tariff (which was alleged to have been rebated) contained a vital condition precedent hich the prior indictment failed to allege and, therefore, was in a vital respect different from the tariff as alleged in he indictment, so that the ground for quashing said indict- ment was not that the indictment was "found defective or insufficient" within the meaning of said saving statute, but rather that the Court found that the allegation of the indict- ment was not supported by the facts, so that the quashing and dismissal was upon the factual merits rather than for mere insufficiency or defect in form of pleading.

While the District Court did not expressly accept or reject this contention, but, instead, apparently based its present order quashing the new indictment solely on the ground that it was returned at the *same* term of court instead of the term next succeeding the term at which the prior indictment was quashed, nevertheless, the contention involves the construction of the Act of May 10, 1934, *supra*, on which the new indictment is based and should be con- sidered and decided by this Court.

2. The plea in bar herein contains an allegation as to the aforesaid opinion quashing said prior indictment, and the basis therefor, which allegation is denied in the answer of the United States to said plea in bar, and it is necessary that this Court examine and consider said opinion on said

prior indictment, as well as the said motion, factual elements, and prior indictment itself, in order to determine whether or not, for the reason stated above, said saving statute exonerates the present indictment from the bar of the statute of limitations.

3. The Solicitor General has (in his letter dated October 4, 1938) authorized this Appellee to state to this Court that though he does not agree with the contentions of the Appellee, he has no objection to the granting of this motion to enlarge the record.

4. The present plea in bar herein was argued in conjunction with the argument of like pleas in No. 309 and No. 310 of the October Term, 1938, of this Court, and the Memorandum of the court below dismissing the indictments is captioned in the three cases, viz.:

UNITED STATES OF AMERICA *v.* DURKEE FAMOUS FOODS, INC.	CRIMINAL No. 7918b.
UNITED STATES OF AMERICA *v.* MANHATTAN LIGHTERAGE CORPORATION.	CRIMINAL No. 7919b.
UNITED STATES OF AMERICA *v.* COLGATE-PALMOLIVE-PEET COMPANY.	CRIMINAL No. 7920b.

A separate order, however, was entered in each case.

In the subsequent proceedings with regard to the record on appeal and the communications by counsel for the respec-

five defendants wit' the United States Attorney and the Solicitor General of the United States, Counsel herein collaborated with Counsel in Nos. 309 and 310, and to avoid prolixity and confusion separate communications were not made in the several cases but the communications in general were made to apply to all. The letter of the Solicitor General dated October 4, 1938, and the letter of counsel to him of September 27th, 1938, to which the Solicitor General's reply was addressed, are both captioned in the three cases.

We therefore respectfully refer this court to the motions to enlarge the record in Nos. 309 and 310, which are submitted together herewith, and to consider this motion in conjunction with the like motions submitted in those cases.

Respectfully submitted,

ALBERT C. WALL,
THOMAS G. HAIGHT, and
JOHN A. HARTPENCE,
Counsel for Appellee.

pp. 1, 2 + 3.

SUPREME COURT OF THE UNITED STATES.

Nos. 309, 310, 311—October Term, 1938.

The United States of America, Appellants, vs. Durkee Famous Foods, Inc. (309)	Appeals from the District Court of the United States for the District of New Jersey.
The United States of America, Appellants, vs. Manhattan Lighterage Corporation. (310)	
The United States of America, Appellants, vs. Colgate-Palmolive-Peet Company. (311)	

[January 30, 1939.]

Mr. Justice McReynolds delivered the opinion of the Court.

The identical questions involved in these three cases require consideration of the Act ~~November 17, 1921 (Ch. 124, 42 Stat. 220,~~ U. S. C. Title 18 sec. 582) which prescribes a three year limitation for offenses not capital, also the Act May 10, 1934 (Ch. 278, 48 Stat. 772, U. S. C. Title 18 sec. 587) which specifies the time during

December 27, 1927, (Ch. 6, 45 Stat. 51,

~~Chapter 124. An Act To amend section 1044 of the Revised Statutes of the United States relating to limitations in criminal cases.~~

~~*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That section 1044 of the Revised Statutes of the United States be amended so as to read as follows:~~

~~"Sec. 1044. No person shall be prosecuted, tried, or punished for any offense, not capital, except as provided in section 1046, unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed: *Provided, however*, That in offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, and now indictable under any existing statutes, the period of limitation shall be six years. This Act shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but this proviso shall not apply to acts, offenses, or transactions which are already barred by the provisions of existing laws."~~

~~Sec. 2. That this Act shall be in force and effect from and after the date of its passage.~~

~~Approved, November 17, 1921.~~

which a new indictment may be returned after the first is found to be defective or insufficient for any cause.[2]

Reference to the facts disclosed by the Record in No. 309 will suffice.

During the April term 1934 the Grand Jury for the District of New Jersey returned an indictment charging appellee with violation of the Elkins Act (February 19, 1903, Ch. 708, 32 Stat. 847, U. S. C. A. Title 49 sec. 41) on August 17, 1932. A motion to quash this was sustained, February 2, 1937, during the January, 1937 term. Later in the same term—April 9, 1937—the Grand Jury returned a second indictment against appellee based on the same facts and containing the same charges as those specified in the 1934 indictment.

To the second indictment appellee interposed what it designated a plea in bar. This alleged (1) that as the offense charged was committed more than three years preceding the return of the pending indictment prosecution was barred by the statute of limitations: (2) that the new indictment was not returned in conformity with the Act May 10, 1934 (note 2, *supra*), since it was reported at the term during which the first indictment was found defective—not at the succeeding one. This plea was sustained and the cause is here by direct appeal.

Counsel for appellants submit—

The Act May 10, 1934 prevented the bar of the statute of limitations from becoming effective until the end of the term next suc-

[2] Chapter 278:—An Act To limit the operation of statutes of limitations in certain cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever an indictment is found defective or insufficient for any cause, after the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned at any time during the next succeeding term of court following such finding, during which a grand jury thereof shall be in session.

Sec. 2. Whenever an indictment is found defective or insufficient for any cause, before the period prescribed by the applicable statute of limitations has expired, and such period will expire before the end of the next regular term of the court to which such indictment was returned, a new indictment may be returned not later than the end of the next succeeding term of such court, regular or special, following the term at which such indictment was found defective or insufficient, during which a grand jury thereof shall be in session.

Sec. 3. In the event of reindictment under the provisions of this Act the defense of the statute of limitations shall not prevail against the new indictment, any provision of law to the contrary notwithstanding.

Sec. 4. The provisions of this Act shall not apply to any indictment against which the statute of limitations has run at the date of approval hereof.

Approved, May 10, 1934.

eding that during which the first indictment was quashed. The ling of the trial court (1) is contrary to the purpose of the Act nd not required by its language; (2) is contrary to the policy and ustrates the general object of the statute of limitations "to en- urage promptitude in the prosecution of remedies"; (3) creates nnecessary inconsistency between the two sections of the Act, and sults in an illogical and unreasonable break within the period of mitation.

The Act of 1934 was passed upon recommendation of the Senate diciary Committee whose report stated that the purpose of the ill was set out in a letter from the Attorney General which it noted.

Inspection of this letter shows quite plainly that the bill as nally enacted undertook to do exactly what the Attorney General sked. The language is apt to express that purpose and we are with- ut authority, by interpretation, to give the statute another eaning.

The challenged judgments must be affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

January 17, 1934.

lon. Henry F. Ashurst,
Chairman Committee on the Judiciary,
United States Senate,
Washington, D. C.

y Dear Senator:

In some criminal cases the offense is not discovered until the statute of mitations has nearly run. In other cases defendants are not apprehended for me time or removal proceedings are instituted and appeals taken from habeas rpus orders refusing to release the defendant on removal order, and in still her cases dilatory motions are made with the hope that, if ultimately sus- ined, the statute of limitations will meanwhile have run against another osecution. To safeguard the interests of the Government in such cases, islation is recommended providing that in any case in which an indictment found defective or insufficient for any cause, after the period prescribed by statute of limitations has run, or where said period of limitations has not but will expire before the end of the next regular session of court, a new lictment may be returned at any time during the first succeeding term of rt at which a grand jury is in session. The judicial conference favors islation of this tenor.

A draft of bill to effectuate this recommendation is enclosed herewith and I ll appreciate it if you will introduce it and lend it your support.

Respectfully,
HOMER CUMMINGS,
Attorney General.